Supreme Court, U.S.
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No. 00-0092

In The

Supreme Court of the United States

LISA HAWKINS,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are There Compelling Reasons to Grant Certiorari in this Case When the Fourth Circuit's Decision Is Entirely Consistent with this Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*?

   Suggested Answer: No.

2. Are There Compelling Reasons for this Court to Review the Fourth Circuit's Ruling That Lisa Hawkins Had Failed to Demonstrate Actionable Racial Harassment?

   Suggested Answer: No.

PARTIES TO THE CASE

1. *Plaintiff / Petitioner*: Lisa Hawkins

2. *Defendant / Respondent*: PepsiCo, Inc.

PARENT AND SUBSIDIARY COMPANIES TO PEPSICO, INC.

1. *Parent Companies*: None.

2. *Nonwholly Owned Subsidiary Companies*: Pepsi Cola Bottling Group.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

A. Overview of Ms. Hawkins' Employment at Pepsi 1

B. Ms. Hawkins' Job Performance at the CSC ... 2

C. Ms. Hawkins' "Complaints" of Racial Problems 7

D. Evidence Misrepresented by Ms. Hawkins ... 9

REASONS FOR DENYING THE WRIT 12

I. MS. HAWKINS' PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION WAS CONSISTENT WITH THIS COURT'S DECISION IN *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.* 12

A. The Fourth Circuit's Decision is Consistent With the Rule of Law Established in *Reeves*.. 13

B. The Fourth Circuit Correctly Assessed Ms. Hawkins' Evidence in Deciding Pepsi's Rule 50 Motion 14

C. Other Evidence Produced By Ms. Hawkins Was Properly Excluded 21

II. THE DISTRICT COURT AND THE FOURTH CIRCUIT PROPERLY DETERMINED THAT MS. HAWKINS HAD NOT PRODUCED EVIDENCE OF A RACIALLY HOSTILE WORK ENVIRONMENT 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Allen v. Michigan Department of Corrections, 165 F.3d 405 (6th Cir. 1999) 28

Bradington v. International Business Machines Corp., 360 F. Supp. 845 (D. Md. 1973) 28

Brady v. Southern Ry. Co., 320 U.S. 476 (1943) 15

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) 26

Carter v. Three Springs Residential Treatment, 132 F.3d 635 (11th Cir. 1998) 19

Chappell v. GTE Products Corp., 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987) 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) ... 26, 27

Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106 (7th Cir. 1998) 17

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 22

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 25, 26, 27

Harrison v. Edison Brothers Apparel Stores, Inc., 151 F.3d 176 (4th Cir. 1998) 15

Hawkins v. PepsiCo, Inc., 203 F.3d 274 (4th Cir. 2000) 28

Johnson v. Maryland, No. 92-1808, 1993 U.S. App. LEXIS 9042 (4th Cir., Apr. 20, 1993) 16

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 12

Luciano v. The Olsten Corp., 110 F.3d 210 (2d Cir. 1997) 19

McDonnell Douglas Corporation v. Green, 41 U.S. 792 (1973) 16

TABLE OF AUTHORITIES – Continued

Page

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) 22

Pagana-Fay v. Washington Suburban Sanitary Commission, 797 F. Supp. 462 (D. Md. 1995) 28

Powell v. Nevada, 511 U.S. 79 (1994) 25

Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 120 S. Ct. 2097 (2000) 12, 13, 14, 16, 21, 29

Segrets, Inc. v. Gillman Knitwear Co., Inc, 207 F.3d 56 (1st Cir. 2000) 15

Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033 (10th Cir. 1993) 17

Tinsley v. First Union National Bank, 155 F.3d 435 (4th Cir. 1998) 17

Trujillo v. University of Colorado Health Sciences Center, 157 F.3d 1211 (10th Cir. 1998) 27

Vaughan v. Metrahealth Cos., Inc., 145 F.3d 197 (4th Cir. 1998) 13

Walker v. Thompson, 214 F.3d 615 (5th Cir. 2000) 27

Williams v. Cerberonics, Inc., 871 F.2d 452 (4th Cir. 1989) 15, 28

Windom v. City of St. Louis, 427 F. Supp. 806 (E.D. Mo. 1977) 28

STATUTES AND RULES

28 U.S.C. § 2111 24

Sup. Ct. R. 10 ..... 12, 14

Fed. R. Civ. P. 50 14

Fed. R. Civ. P. 50(a) 15

Fed. R. Civ. P. 61 24

Fed. R. Evid. 103(a) 24

STATEMENT OF THE CASE

By her Petition for Writ of Certiorari, petitioner Lisa Hawkins seeks this Court's intervention in a case that raises no compelling legal issues, poses no significant impact to the public at large and involves no errors by the lower courts. She would have this Court characterize a mere difference of opinion with her former supervisor at respondent PepsiCo, Inc. ("Pepsi") over her work performance as illegal discrimination. She attempts to bolster her claims with an inaccurate rendition of the facts. The record in this case, established through Ms. Hawkins' case at trial, demonstrates without question that Pepsi terminated her employment because her supervisor was dissatisfied with her work.

A. Overview of Ms. Hawkins' Employment at Pepsi

Pepsi hired Lisa Hawkins, an African-American female, in 1990 as a Brand Manager. (J.A.[1] at 1790-93). Over the following two years, Ms. Hawkins moved to Franchise Manager and Administrative Manager positions, receiving substantial salary increases with each move. (J.A. at 1802, 1807, 2371-72). In or about June 1993, Ms. Hawkins' Administrative Manager position was eliminated at her own suggestion and she began looking for new jobs at Pepsi. (J.A. at 1811-12). Ms. Hawkins

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[1] Consistent with the Petition for Writ of Certiorari, citations to "J.A." refer to the joint appendix filed with the court of appeals. The Appendix to the Petition for Writ of Certiorari will be cited as "App."

applied for work at the new Pepsi Customer Service Center ("CSC") in North Carolina, which was in its start-up phase at that time. (J.A. at 1817-18, 3249-52).

Ms. Hawkins was hired at the CSC in or about June 1993. She worked there for approximately nine months. After receiving two consecutive, unfavorable appraisals of her performance from her supervisor, her employment with Pepsi was to be terminated. Ms. Hawkins, however, left Pepsi before her termination date because of a misunderstanding about when that date was.

B. Ms. Hawkins' Job Performance at the CSC

Ms. Hawkins' claims are based on events that occurred while she worked at the CSC. Contrary to Ms. Hawkins' averment, she was not "transferred" by Pepsi to the CSC. While she was recommended for her position by a Pepsi executive, Ms. Hawkins still had to interview for the job. (J.A. at 1821, 1823). She was interviewed twice in June 1993 by Sally Price, the General Manager of the CSC. (J.A. at 1821, 1823, 1826). Ms. Price made the decision to hire Ms. Hawkins as a Tel-Sell Manager at the CSC. (J.A. at 1823, 1826, 2372-73, 2925, 3252). Because the CSC was still in its nascent stages, there were no Tel-Sell employees for Ms. Hawkins to manage at that time. (J.A. at 1827-28, 2376). In fact, only one other Tel-Sell manager was hired during Ms. Hawkins' brief tenure at the CSC due to significant delays in bringing the CSC up to full capacity. (J.A. at 1969-70, 2375-76, 2386-87, 2774-75, 3843).

Because there were no employees for Ms. Hawkins to manage when she was hired, Ms. Price assigned Ms.

Hawkins unique and specialized projects which were critical to bringing the CSC into full operation. (J.A. at 1828, 2375-76). Ms. Price created that role for Ms. Hawkins. No predetermined duties or accountabilities for the job existed. Ms. Price assigned work to Ms. Hawkins on an *ad hoc* basis and gave her verbal and written instructions, feedback and prioritization for the projects she assigned. (J.A. at 1857-60, 2378-81, 3802-03, 3807, 4691, 4702).

Ms. Price delegated two major responsibilities to Ms. Hawkins. First, Ms. Hawkins was responsible for selecting and training ("on-boarding") new CSC account receivable clerks and Tel-Sell agents. (J.A. at 1828). Second, she was asked by Ms. Price to develop an information resource that would document information learned from examining the Tel-Sell operations of Pepsi and its competitors. *Id.* Because Ms. Price was the Pepsi employee ultimately responsible for the success of the CSC, she had every reason to demand that Ms. Hawkins execute those projects completely, diligently and to her satisfaction.

Ms. Price personally assessed Ms. Hawkins' job performance through direct observation as well as through discussions and written communications about the status of the projects. (J.A. at 2379-83, 2917). Ms. Price expressed strong dissatisfaction with Ms. Hawkins' work performance. In addition to verbal criticism, Ms. Price provided Ms. Hawkins with formal written criticism of her job performance. On October 20, 1993, Ms. Price met with Ms. Hawkins to discuss a "developmental feedback" memo Ms. Price had drafted. (J.A. at 1881-90). The feedback memo listed Ms. Hawkins' assignments, described

what Ms. Price perceived as the necessary skills for successful completion of the assignments and assessed Ms. Hawkins' work against those skills. (*Id.* and at 3818). The feedback document highlighted specific areas for Ms. Hawkins to improve upon. *Id.* Ms. Price cited Ms. Hawkins' work on the information resource project as evidence of Ms. Hawkins' need for better written communication skills and her lack of ability to properly focus and draw conclusions. *Id.* As to the on-boarding project, Ms. Price noted Ms. Hawkins' poor organizational skills and her inability to effectively involve her teammates. *Id.* Ms. Price also believed that Ms. Hawkins had not properly coached the administrative team at the CSC when problems arose. *Id.* Finding her overall performance unsatisfactory, Ms. Price placed Ms. Hawkins on a 90-day "targeted performance improvement plan aimed at bringing her performance to an on-target level." (J.A. at 2934, 3834).

Ms. Price subsequently attempted to guide and coach Ms. Hawkins to a better performance. At their October 20 meeting, Ms. Price gave Ms. Hawkins a written statement of her accountabilities through December 1993, accompanied by detailed goals or measures for each accountability. (J.A. at 1887, 1896, 3819). After the meeting, both Ms. Price and Jane Marvin, the Human Resources Manager at the CSC, personally coached Ms. Hawkins to help her achieve her written accountabilities. (J.A. at 2407-08, 3834). Ms. Price particularly gave repeated guidance and input into Ms. Hawkins' work after their October 20 meeting. (J.A. at 2411-21).

Ms. Hawkins disagreed with Ms. Price's developmental feedback but never responded formally to Ms.

Price. She instead wrote directly to Ms. Price's supervisor, Brenda Barnes, who was Pepsi's Chief Operating Officer. On December 15, 1993, two months after the October 20 meeting with Ms. Price and almost 60 days into her 90 day improvement plan, Ms. Hawkins forwarded a memorandum to Ms. Barnes. (J.A. at 1943, 2095-99, 2425-26, 3847). Written in the form of a memo to Ms. Price, the memo to Ms. Barnes relates Ms. Hawkins' general disagreement with Ms. Price's October 20 feedback. It does not provide any specific examples of unfair criticisms by Ms. Price. (J.A. at 2095-99, 2428, 3847). Ms. Hawkins did write that she wanted to move back into Pepsi field sales and candidly questioned whether she "ha[d] a future at the Pepsi Cola Company" if Ms. Price remained dissatisfied with her work. (J.A. at 2428-29, 3847).

Ms. Hawkins continued to work on special projects, and Ms. Price continued to be dissatisfied with her performance. On February 8, 1994, Ms. Price and Ms. Marvin met with Ms. Hawkins to review her performance. (J.A. at 2158-59). Ms. Price provided Ms. Hawkins with a written performance appraisal that rated her overall performance "below target." (J.A. at 3834). Ms. Price's detailed criticisms of Ms. Hawkins' work were consistent with those contained in her developmental feedback to Ms. Hawkins in October 1993. *Id.* Ms. Hawkins again disagreed with Ms. Price's criticisms and the meeting grew contentious as they bickered over individual performance ratings. (Marvin, J.A. at 2809-10). Ms. Marvin finally stepped in and redirected the focus of the meeting to a discussion about Ms. Hawkins' future. (*Id.* at 2811).

Since Ms. Hawkins' duties as a Tel-Sell Manager were not expected to materialize within the next 12 months,

three other options were discussed. (*Id.* and at 2159). The first option was for Ms. Hawkins to continue working in a special projects capacity at the CSC, which no one viewed as desirable. (J.A. at 2158, 2447-48, 2802-03, 2811, 2813, 2953, 2956, 2964). The second option was to attempt to place Ms. Hawkins back into Pepsi field sales, an option which Ms. Hawkins preferred. (J.A. at 2159, 2447-48, 2802-03, 2812-13, 2964). If no sales positions were available, the final option was to help Ms. Hawkins find opportunities outside of Pepsi. (J.A. at 2159-60, 2449, 2811, 2953).

After the February 8 meeting, both Ms. Price and Ms. Marvin searched for sales positions for Ms. Hawkins. (J.A. at 2775-76, 2779, 2781-83, 2806-08, 2961-63, 2969, 2973-74, 2983). Their search was hampered because Ms. Hawkins had no sponsorship. Ms. Price did not want to vouch for Ms. Hawkins' abilities due to her performance problems at the CSC and because she never assessed Ms. Hawkins in a sales capacity. (J.A. at 2162-64, 2782-87, 2966-68, 3311-12). Lawrence Jackson, an African American Pepsi executive who acted as a mentor to Ms. Hawkins, also refused to sponsor her because of performance issues she had at each of her positions at Pepsi. (J.A. at 2776, 2781-82, 2794, 2964-65, 2977-78). Consequently, Ms. Price and Ms. Marvin could not find a sales position for Ms. Hawkins and began to look into outplacement options. (J.A. at 2814, 2850). Ms. Marvin spoke to Ron Parker, Pepsi's Vice President of Employee Services, to see if he could assist Ms. Hawkins in identifying positions outside of Pepsi. (J.A. at 2821-22). Ms. Marvin also investigated what Pepsi could offer Ms. Hawkins in the form of severance. (*Id.* at 2817-23).

Ms. Marvin scheduled a meeting with Ms. Hawkins on March 3, 1994 to discuss the types of severance she might receive when she left Pepsi. (*Id.* at 2827-28, 2850). At the meeting, Ms. Marvin handed Ms. Hawkins a sample severance letter as a discussion tool regarding potential severance arrangements, which were outlined in the letter. (J.A. at 2865-69, 3837-40). The unsigned sample letter is addressed to Ms. Hawkins from Ms. Marvin and is dated February 22, 1994, two weeks before the March 3, 1994 meeting. (J.A. at 2865-69, 3837). The letter states, "As your manager has just informed you, your employment will be terminated effective 3/4/94." (J.A. at 3837). Ms. Hawkins was not scheduled to be "terminated" on March 4, 1994 and no one informed her otherwise. (J.A. 2865-69). Ms. Hawkins, however, apparently believed that the letter constituted a termination notice. (J.A. at 2348-49). On or about March 4, 1994, she removed her belongings from her office and left Pepsi. (Marvin, J.A. at 2869-70). She never returned to work or answered the several phone calls from Ms. Marvin after that date. *Id.*

C. Ms. Hawkins' "Complaints" of Racial Problems

Ms. Hawkins first alleged racial problems at Pepsi in 1991. Ms. Hawkins reported alleged racial tensions between herself and a Pepsi bottler named Lee Teeter.[2]

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[2] Ms. Hawkins learned that Mr. Teeter had referred to her as a "nigger" and that he did not wish to do business with her. (J.A. at 3366). The events directly related to this incident and Pepsi's response to Ms. Hawkins' report are not at issue in this case because they occurred outside of the relevant statute of limitations. (App. at 37-39).

(J.A. at 3508-11). She related the alleged problems with Mr. Teeter to Lawrence Jackson, Maurice Cox and Ronald Parker, all African American executives with Pepsi. (*Id.* and at 3365-66).

Ms. Hawkins' never clearly established what Ms. Price or Ms. Marvin, the people involved in her termination, knew about these alleged problems or when they became aware of the issue. (J.A. at 2665). Ms. Marvin learned from another Pepsi supervisor only that Ms. Hawkins experienced problems of a racial nature with a bottler in a previous Pepsi job and related that limited information to Ms. Price. (J.A. at 2727-28). Ms. Marvin never heard about the Teeter situation again until Ms. Hawkins mentioned it at their March 3, 1994 meeting, the same meeting that Ms. Hawkins claims was convened to terminate her employment. (J.A. at 2747-48). Ms. Price also discussed Ms. Hawkins' "bottler incident" with Lawrence Jackson, who stated only that he placed it "in a positive light." (J.A. at 3263). Ms. Hawkins presented no evidence that either Ms. Price or Ms. Marvin knew that she made a complaint about the Teeter incident to Pepsi management. (J.A. at 3263). Both Ms. Marvin and Ms. Price decided that their "very limited information" about the incident raised no concerns over Ms. Hawkins' ability to perform her job at the CSC. (J.A. at 2728-29).

Ms. Hawkins made her second complaint of race discrimination in the December 15, 1993 memo she sent to Brenda Barnes. In that memo, Ms. Hawkins alleged: "I have had to deal with a lot of issues since I started with Pepsi 3.5 yrs ago. Until working at Pepsi I had never experience (sic) such racism and sexual harassment in my whole life." (J.A. at 3847). The memo did not relate a

single specific incident of racism and did not specify when the alleged racism occurred. The memo did not accuse Ms. Price of racism and in fact did not allege that she experienced any racism at the CSC. The memo did not ask Brenda Barnes to investigate her allegations of racism. (*Id.* and at 2430-31).

Ms. Barnes nevertheless responded to Ms. Hawkins' memo. Ms. Barnes discussed the memo with Ms. Price, with Lawrence Jackson and with Maurice Cox (an African American male who was Pepsi's Vice President for Corporate Development and Diversity). (J.A. at 3047-48). Ms. Price herself spoke to Ms. Hawkins about the memo and expressed her serious concern about Ms. Hawkins' racism allegations. (J.A. at 2109-10, 2937-39). Ms. Hawkins told Ms. Price that she had not experienced racism at the CSC. *Id.* Ms. Hawkins disputes this account and contends that Ms. Price only asked her about sexual harassment. (*Id.* at 2431-32). Ms. Hawkins' own testimony, however, confirms that she did not allege racism at the CSC in that discussion or at any time thereafter. (*Id.* at 2109-10, 2113-14).

D. Evidence Misrepresented by Ms. Hawkins

Ms. Hawkins' petition misrepresents other evidence in order to bolster her arguments. Pepsi wishes to correct these unsupported allegations. Ms. Hawkins claims that Pepsi articulated multiple, conflicting justifications for her termination. (Petition, at 12, 17). Pepsi, however, has steadfastly maintained that Ms. Hawkins' poor performance set in motion the series of events that resulted in her termination. *See, supra* at 5-7. It is true that Ms. Price

and Ms. Marvin discussed other opportunities within Pepsi with Ms. Hawkins as an alternative to terminating her. (J.A. at 2811-12). Those discussions were made necessary because Ms. Hawkins' unacceptable work performance prohibited her from continuing to work in her special projects role with Sally Price. At the time Ms. Hawkins left Pepsi, the focus had shifted to placing her outside of the company. Far from being inconsistent, these events demonstrate that Pepsi made a determined effort to assist Ms. Hawkins in finding new employment and planned to terminate her only as a last resort.

Ms. Hawkins curiously misstates her own testimony about a conversation with Ms. Marvin. Ms. Hawkins testified that Ms. Marvin told her that her poor performance was not an issue ***in the unavailability of sales jobs at Pepsi***. (J.A. at 2330-31). Neither Ms. Hawkins nor Ms. Marvin testified that Ms. Hawkins' proposed *termination* was unconnected to her performance. (Petition, at 12, 13).

Ms. Hawkins claims that she was "transferred" to the CSC. (Petition, at 6, 16). However, it is undisputed that she had to interview with Sally Price twice for the CSC position and that Ms. Price alone made the hiring decision. (J.A. at 1821, 1823, 2372-73, 2924-25, 3252). Ms. Hawkins did show that she was recommended to Sally Price by Lawrence Jackson. Mr. Jackson, however, testified that it was "Sally's hiring decision, not mine." (J.A. at 3252).

Ms. Hawkins inaccurately alleges that Pepsi management failed to investigate her complaints of racism. (Petition, at 10-11). Each person to whom Ms. Hawkins related

concerns about racism made follow-up calls to Ms. Marvin or Ms. Price or to her. (J.A. at 3047-48, 3115-16, 3304-05). Mr. Jackson and Mr. Parker also discussed Ms. Hawkins' concerns with Mr. Cox. (J.A. at 3105-06, 3295-97). To the extent that Ms. Hawkins is concerned that no corrective action was taken, she made no showing that these executives actually believed that there was a racial discrimination problem at the CSC. (*See, e.g.*, J.A. at 3298 (Jackson's "racial 'antenna' never went up on Sally"), 3305 (Jackson attributed problems between Price and Hawkins to bad chemistry, not race)).

Ms. Hawkins also incorrectly alleges that Ms. Marvin told Ms. Price that Ms. Hawkins was suing Pepsi over her alleged problems with Mr. Teeter. (Petition, at 6). Ms. Marvin testified only that she told Ms. Price that another Pepsi executive related Ms. Hawkins' "concern related to a bottler." (J.A. at 2720).

Ms. Hawkins correctly states that Pepsi had an aspirational "Right Side Up" policy that stressed diversity. (Petition, at 6, 15; J.A. at 2886). However, there is no evidence to support her allegation that the policy "required" Ms. Price to hire blacks in upper management at the CSC. Indeed, if that were true, it would suggest that Ms. Price would have every incentive not to terminate Ms. Hawkins.

Finally, Ms. Hawkins alleges that Ms. Price falsely accused Ms. Hawkins of "upsetting her team." (Petition, at 7). A co-worker, Fran Healy, testified that she once told Ms. Price that Ms. Hawkins was having a family problem. (J.A. at 3147-48). Ms. Healy later heard from Ms. Hawkins that Ms. Price spoke to Ms. Hawkins about letting her

personal problems upset the team. *Id.* Ms. Healy explained, however, that she believed Ms. Price simply misunderstood her or "took it differently." (J.A. at 3147).

REASONS FOR DENYING THE WRIT

I.

MS. HAWKINS' PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION WAS CONSISTENT WITH THIS COURT'S DECISION IN *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. This Court has always been guided by the principle that certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . ." *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitions for writs of certiorari therefore must present "compelling reasons" for this Court to review a court of appeals decision, such as settling an important but unclear legal issue or remedying a serious departure from the "accepted and usual course of legal proceedings . . . ." Sup. Ct. R. 10.

Ms. Hawkins' petition does not meet this stringent standard. As the Fourth Circuit correctly opined, Ms. Hawkins' case involves no more "than a routine difference of opinion and personality conflict with her supervisor." (App. at 3). Ms. Hawkins now asserts that this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*,___ U.S. ___, 120 S. Ct. 2097 (2000), enhances her case

both legally and factually, vaulting her ordinary workplace disagreement into the realm of actionable race discrimination, retaliation and harassment. The Fourth Circuit's decision in this case is legally and factually unassailable and is entirely consistent with *Reeves*. Accordingly, Pepsi requests that this Court deny Ms. Hawkins' petition.

A. The Fourth Circuit's Decision is Consistent With the Rule of Law Established in *Reeves*.

In her first question presented for review, Ms. Hawkins contends that District Court and Fourth Circuit decisions conflict with the legal holdings in *Reeves*. (Petition, at 15, 18). The main holding in *Reeves* resolved a split among the Circuit Courts of Appeals over whether discrimination cases may reach a jury once the plaintiff has demonstrated the falsity of his employer's non-discriminatory justification of an adverse employment action, i.e. whether the plaintiff must show "pretext-plus" to reach a jury. *Reeves* confirmed that "a plaintiff's *prima facie* case, combined with *sufficient* evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, ___ U.S. at ___, 120 S. Ct. at 2109 (emphasis supplied).

Although the Fourth Circuit followed the "pretext-plus" standard in discrimination cases before *Reeves*, *(see, e.g., Vaughan v. Metrahealth Cos., Inc.*, 145 F.3d 197, 201-02 (4th Cir. 1998)), it never applied that standard in this case. Pepsi maintained that it terminated Ms. Hawkins due to her "below target" work performance and the Fourth

Circuit found that "Hawkins has failed to show that Pepsi's proffered reasons for her termination were pretextual." (App. at 8). The Fourth Circuit's decision, therefore, comports with the *Reeves* holding on burden-shifting.[3]

B. The Fourth Circuit Correctly Assessed Ms. Hawkins' Evidence in Deciding Pepsi's Rule 50 Motion.

The main thrust of Ms. Hawkins' argument on both her first and second questions presented on appeal concerns the Fourth Circuit's treatment of the evidence in this case. According to Ms. Hawkins, the Fourth Circuit improperly weighed the parties' evidence and made credibility determinations in derogation of Rule 50, as clarified by *Reeves*, (Petition, at 18), or simply reached the wrong conclusion based on the evidence, (*id.* at 19-21). As to either argument, Ms. Hawkins' petition should be denied. Certiorari petitions are "rarely granted" to correct factual errors or misapplication of properly stated legal principles. Sup. Ct. R. 10. Without alleging more than a simple evidentiary error by the Fourth Circuit, Ms. Hawkins has not provided compelling reasons for this Court to take up her dispute with Pepsi.

Nevertheless, the Fourth Circuit's analysis abided by the very purpose of Rule 50. Rule 50 permits, indeed

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[3] Ms. Hawkins' petition also ignores *Reeves'* recognition that there may be cases in which proving pretext is not sufficient to create a jury issue of intentional discrimination. *Reeves*, ___ U.S. at ___, 120 S. Ct. at 2109.

compels, courts to take a case from the jury and decide it as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue,. . . . " Fed. R. Civ. P. 50(a). The non-moving party can overcome a Rule 50 motion only by producing substantial evidence showing by *probability*, rather than mere possibility, that she has proved her case and that a verdict in her favor would not be based on speculation or conjecture. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 480 (1943) (directed verdict removes that chance of jury speculation over unfounded claims); *Segrets, Inc. v. Gillman Knitwear Co., Inc*, 207 F.3d 56, 65 (1st Cir. 2000) (party opposing judgment as a matter of law cannot rely on speculation or conjecture); *Harrison v. Edison Brothers Apparel Stores, Inc.*, 151 F.3d 176, 179 (4th Cir. 1998) (non-moving party cannot survive judgment as a matter of law on mere possibility that jury could believe her story). Rule 50 can be pivotal in discrimination cases, where juries presented with deficient evidence of discrimination may still return plaintiffs' verdicts through the "impermissible but understandable resort to such factors as sympathy . . . ." *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458 (4th Cir. 1989) (citation omitted); *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987).

Ms. Hawkins alleges that she introduced substantial evidence that proved Ms. Price's criticisms "false" by demonstrating somehow that her work was "good" or "acceptable."[4] She alleges that her evidence mirrors the

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[4] Because Ms. Hawkins produced no direct evidence of discrimination, the lower courts analyzed her case under the

approach that won the day for the plaintiffs in *Reeves* and similar cases. *Reeves* is clearly distinguishable from this case in the nature of the employers' justifications. Plaintiffs like the one in *Reeves* were terminated for certain reasons that could be objectively proven untrue, such as inaccurate or incomplete work or co-worker complaints. When contrary evidence is introduced, it permits the inference that the employer was lying or masking discrimination when it offered that explanation. *Reeves*, ___ U.S. at ___, 120 S. Ct. at 2103-04 (plaintiff rebutted claim that failed to maintain accurate time records by proving that records were accurate). *Accord Johnson v. Maryland*, No. 92-1808, 1993 U.S. App. LEXIS 9042, *10-11 (4th Cir., Apr. 20, 1993) (plaintiff proved false employer's claims that his co-workers complained about his performance and that he failed to update library filing system). Ms. Hawkins, on the other hand, was terminated based on her failure to conform to her supervisor's expectations of appropriate managerial skills and work quality. Those subjective assessments are not capable of a "true/false"

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familiar burden shifting analysis in *McDonnell Douglas Corporation v. Green*, 41 U.S. 792, 802-04 (1973). Ms. Hawkins' *prima facie* burden was never addressed by the courts and thus is not at issue here. Ms. Hawkins herself proved Pepsi's legitimate explanation in her case-in-chief by introducing substantial evidence that Ms. Price was displeased with her work. *See, e.g., supra* at 3-5 (discussions of developmental feedback and performance appraisal); (J.A. at 1878-79, 1981-84, 2001, 2025-34, 2415-16, 2919, 3818, 3831, 4129, 4144, 4161, 4243, 4703, 4712). Thus, the parties reached the ultimate issue: whether Ms. Hawkins presented substantial evidence that Pepsi's legitimate explanation for her discharge, i.e. Ms. Price's dissatisfaction with her work, was pretextual.

determination or some absolute litmus test for "acceptability." Ms. Price created and monitored the projects Ms. Hawkins worked on, projects which ultimately dictated Ms. Price's own professional success. Thus, as the Fourth Circuit correctly determined, only Ms. Price's perception of "good" or "acceptable" performance is relevant. *See Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1114 (7th Cir. 1998) (plaintiff's self-assessment of work does not rebut the honesty of employer's negative assessment); *Tinsley v. First Union National Bank*, 155 F.3d 435, 444-45 (4th Cir. 1998) (assessment of plaintiff and co-workers irrelevant to proving employer's assessment dishonest); *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1039 (10th Cir. 1993) (plaintiff's assessment of his own job performance cannot raise triable issue). Ms. Hawkins' task was not to reset the standard for "good" work, but to prove that Ms. Price's criticisms were dishonest or a mask for discrimination.

A review of her "substantial" evidence reveals that Ms. Hawkins did not prove Ms. Price dishonest in the least. In rebutting Pepsi's justification, Ms. Hawkins' relied on her own testimony, the testimony of her co-workers and documents relating to her project work as rebuttal evidence. The "53 documents" Ms. Hawkins cites are simply e-mails and memoranda from Ms. Hawkins herself describing the status of the work she was doing. (*See, e.g.*, J.A. at 3990-93, 3996-98). At most, they show that Ms. Hawkins was working but not that she was performing to Ms. Price's expectations.

Ms. Hawkins attempts to prove her work "acceptable" through her own testimony and that of her co-workers. This testimony shows only that different people

can rate differently what constitutes "acceptable" work performance. Ms. Hawkins and her co-workers disagreed with Ms. Price about how well Ms. Hawkins coordinated the involvement of her teammates in her projects and about the quality of her written work. The fact that Ms. Hawkins would rate her own work more positively than the person who terminated her is both unsurprising and unhelpful in demonstrating that Ms. Price's criticisms were dishonest. As for her co-workers' testimony, they had no basis for assessing the quality of Ms. Hawkins' work because they held different jobs in a different department, with different responsibilities. They therefore could not confirm from personal experience what Ms. Price's expectations were for Ms. Hawkins' position, much less whether Ms. Hawkins met those expectations.[5]

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[5] Ms. Hawkins claims that Pepsi retaliated against her for reporting Lee Teeter's alleged racial comments or for alleging to Brenda Barnes that she experienced "3.5 years" of racism at Pepsi. However, because a legitimate non-retaliatory justification for a discharge will defeat a retaliation claim even if the employer has knowledge of the employee's prior protected activity, Ms. Hawkins' failure to rebut Pepsi's explanation for her termination dooms her retaliation claims. Moreover, her other evidence of retaliation was too weak to create a jury issue of retaliation. She presented vague and unspecific evidence of Ms. Price's and Ms. Marvin's knowledge of her problems with Lee Teeter and the timing of their knowledge. More importantly, she never demonstrated that Ms. Price or Ms. Marvin knew that she *reported* the Teeter incident. Likewise, her memo to Ms. Barnes did not specifically allege racism by Ms. Price or anyone else at the CSC. Additionally, Ms. Price's February 1994 "below target" appraisal of Ms. Hawkins was consistent with her October 1993 critical feedback, which was given two months *before* Ms. Hawkins contacted Brenda Barnes.

Ms. Hawkins objects that rejecting the subjective performance assessments by plaintiffs and their co-workers places an "impossible burden" on plaintiffs who are fired for subjective reasons, while inviting employers to mask discriminatory firings with subjective assessments. This is not true. Since the essence of discrimination statutes is to ensure *equal* treatment for similarly situated employees, Ms. Hawkins should have focused on the *comparative*, rather than the "objective," merits of her work. Ms. Hawkins failed to introduce evidence that white employees were treated and reviewed more favorably by Ms. Price *for performing the same or lesser quality work*, or that white workers with lower appraisal ratings were not harshly criticized or fired. *See, e.g., Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 643 (11th Cir. 1998) (African American plaintiff demonstrated that his credentials and experience were comparable to those of white co-worker promoted ahead of him); *Luciano v. The Olsten Corp.*, 110 F.3d 210, 216 (2d Cir. 1997) (female executive demonstrated that male executives with lower performance ratings were treated more favorably). *But see Griffin v. Super Valu*, 2000 WL 968514, at *2-3 (8th Cir., July 14, 2000) (no pretext shown by lesser discipline of white co-workers where plaintiff could not show that the co-workers and he were "similarly situated in all relevant respects"). Ms. Hawkins, however, made no comparisons of her work with that of her co-workers. Without demonstrating that her work was comparable to her white colleagues, the evidence that she was appraised less favorably does not permit an inference of discrimination. In fact, the evidence that she was treated less favorably

than her white co-workers is consistent with her supervisor's criticisms of her work and her "below target" performance appraisal.

Additionally, the rejection of the subjective assessments of her performance by Ms. Hawkins and her co-workers does not amount to "weighing" the evidence or making credibility determinations, as Rule 50 prohibits. Nor did the Fourth Circuit reject Ms. Hawkins' pretext evidence, as she implies, because of its source (her testimony and that of her co-workers). The court below rejected that evidence because it was not factual. It was merely the opinions of Ms. Hawkins and her co-workers trying to initiate a debate about her work quality. The Fourth Circuit properly disregarded that evidence because those subjective assessments did not demonstrate pretext, but only a disagreement about the quality of Ms. Hawkins' work.[6]

Having found that Ms. Hawkins failed to rebut directly Pepsi's performance justifications, both the District Court and the Fourth Circuit examined the record for evidence of discriminatory animus. They found none. She complains that Ms. Price did not utilize a "360 degree" feedback technique (soliciting input from co-workers), (Petition, at 7), yet a white co-worker testified that she never received 360 degree feedback, (J.A. at 3205). Ms.

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[6] The District Court's off-the-cuff assessment of the evidence in the middle of the trial is not evidence in this case. (*See* Petition, at 3-4). Nor is it remarkable that the District Court changed its opinion of Ms. Hawkins' evidence once it had the time to digest the entire record and consider the parties' arguments on Pepsi's Rule 50 motion.

Hawkins avers that she was singled out for harsh criticism, that her suggestions were singularly discounted and that she and Fred Canady were told that they were "not of the caliber" to be managers. However, she admits that Ms. Price rated her and Mr. Canady's performance "below target," consistent with her treatment of them. She alleges that Ms. Price asked about Mr. Canady's childhood friends and his neighborhood, and that she attended a party at which Ms. Price gave gifts to everyone but her. This evidence demonstrates at most that Ms. Price was strident and perhaps rude, or that she did not like Ms. Hawkins personally. None of this evidence has any racial significance. On the other hand, the courts below specifically noted that Ms. Price went to the trouble to hire and coach Ms. Hawkins with full knowledge of her race, a fact which suggested that Ms. Hawkins' termination a few months later was not racially motivated.

In sum, Ms. Hawkins utterly failed to prove that she was terminated for producing work *comparable* to that of her white co-workers or that Ms. Price harbored any racial animus. Consequently, she begs this Court to infer invidious discrimination from the mere fact that she is African American and received a "below target" rating. Plaintiffs alleging discrimination, however, cannot prove their cases by innuendo. Accordingly, this Court should deny Ms. Hawkins' petition for certiorari on her discrimination and retaliation claims.

C. Other Evidence Produced By Ms. Hawkins Was Properly Excluded.

While *Reeves* clarified the amount of evidence needed to reach a jury in a discrimination case, it did not alter the

Federal Rules of Evidence. Ms. Hawkins contends that the Fourth Circuit erred when it affirmed the District Court's exclusion of what she claims is probative evidence of pretext or discriminatory animus. Evidentiary decisions, however, fall within the sound discretion of the trial court. *See, e.g., General Electric Co. v. Joiner,* 522 U.S. 136, 141-42 (1997) (citing *United States v. Abel,* 469 U.S. 45, 54 (1984). The District Court's exclusion of Ms. Hawkins' evidence, whether justified or not, is simply not an issue worthy of this Court's attention. *See McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553 (1984) (" '[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials") (quoting *Brown v. United States,* 411 U.S. 223, 231-32 (1973) (internal quotation omitted)).

It is clear that the District Court's evidentiary decisions here were well within its broad discretion. All of the excluded evidence was irrelevant, prejudicial, without proper foundation or based on hearsay. Two pieces of excluded evidence bear particular mention here, because Ms. Hawkins continues to raise them for their obvious prejudicial value. First, she objects to the District Court's exclusion of testimony that Lee Teeter allegedly referred to her as a "nigger." Mr. Teeter's comments were not germane to this case because Ms. Hawkins' claims involving that incident and Pepsi's response to it were time-barred. (App. at 37-39). As to her claim of retaliation for reporting the incident, the relevant consideration is whether Ms. Price and Ms. Marvin knew that Ms. Hawkins filed a complaint about the incident, not the details of the incident. Even so, Ms. Hawkins was unable to show that Ms. Price and Ms. Marvin were ever told

what Teeter said. All Ms. Hawkins could show was that they knew vaguely about a "racial problem" she had with a bottler.

In a similar vein, the District Court properly excluded testimony of Fred Canady about private conversations he had with Ms. Hawkins in which they compared the CSC to a "plantation" and Ms. Price's criticisms to "beatings." Mr. Canady admitted that some of the comments may not have actually been said and further admitted that they were said in jest to relieve tension and stress. (J.A. at 3502). Moreover, these conversations, most of which occurred out of the workplace, show only Ms. Hawkins' and Mr. Canady's reactions to Ms. Price's supervision. They do not prove Ms. Price's alleged discriminatory animus. Ms. Hawkins' invocation of the word "nigger" and her subjective comparison of Ms. Price to a slaveholder would have been highly prejudicial to Pepsi. Pursuant to Federal Rule of Evidence 403, that testimony was properly excluded.

The rest of the District Court's evidentiary decisions were pedestrian and bear little attention here. The District Court properly excluded as irrelevant testimony of Ms. Hawkins' co-workers as to whether they would have rated her work "below target." (J.A. at 3142, 3159, 3210, 3455-56). The District Court also excluded as irrelevant testimony about conversations she had with Messrs. Cox, Jackson and Parker about the Lee Teeter situation, because the Teeter situation was not at issue, those executives did not fire her and Ms. Price or Ms. Hawkins were not aware of the substance of the conversations. (J.A. at 1711-19, 3079-93, 3116 (Parker did not tell Marvin of Hawkins' racial problems with bottler), 3252 (Jackson

doubts that he told Price about Hawkins' past racial problems), 3366-67). Comments that Mr. Canady attributed to Ms. Price (about his relationship with childhood friends and whether he sees white people in his neighborhood) were irrelevant because they were not discriminatory in nature, showed no racial animus and had absolutely no relation to Ms. Hawkins' employment situation. Other testimony was excluded because it was improper opinion or hearsay testimony. (*See* J.A. at 2349-50 (Hawkins' opinion that Ms. Price was "angry" about the allegations of racial discrimination at the CSC), 2581-91 (Hawkins' allegation that Lawrence Jackson told her that her prior racial complaints would "follow her" at Pepsi), 3443, 3449 (Canady's opinions that black employees "feel" Ms. Price's management style more than white employees and that he didn't "think" Ms. Price criticized white employees as she did him)).

Importantly, most of Ms. Hawkins' excluded evidence was cumulative to evidence she successfully introduced in other forms. (*See* J.A. at 3126-28, 3151-54, 3160-61, 3215-17 (co-workers testifying about Price's treatment of Hawkins); *id.* at 3508-10 (Pepsi's admissions regarding Hawkins' conversations with Jackson and Cox about the Teeter incident); *id.* at 2293-94, 2728-29 (Marvin's testimony that she shared her limited knowledge of the Teeter incident with Price); *id.* at 2075-77 (Hawkins' testimony about alleged Price comments to Canady about his childhood friends and neighborhood; Hawkins' testimony comparing Price's treatment to "beatings" and CSC to "plantation")). She therefore suffered no prejudice from the exclusion of the cumulative evidence. *Cf.* 28 U.S.C. § 2111 (judgment on appeal shall be given without

regard to errors that do not affect substantial rights of parties); Fed. R. Civ. P. 61 (harmless error where excluded evidence is not inconsistent with substantial justice and does not affect substantial right of party); Fed. R. Evid. 103(a) (error cannot be predicated on excluded evidence unless substantial right of party is affected).

Accordingly, there is no compelling reason for this Court to revisit the routine and ultimately correct evidentiary decisions of the District Court.

II.

THE DISTRICT COURT AND THE FOURTH CIRCUIT PROPERLY DETERMINED THAT MS. HAWKINS HAD NOT PRODUCED EVIDENCE OF A RACIALLY HOSTILE WORK ENVIRONMENT.

Ms. Hawkins finally urges the Court to grant certiorari on her racial harassment claims. She contends that the District Court, as affirmed by the Fourth Circuit, misapplied the facts in this case to the legal standard for hostile work environment harassment claims set forth in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993). As already noted *supra*, this Court "rarely" grants a petition for writ of certiorari for this reason. *Harris* clearly established the standard for determining what constitutes hostile work environment harassment and this case presents no opportunity to revisit this well-settled standard. As the Court has previously noted, "[w]e make poor use of judicial resources when . . . we take a case merely to reaffirm (without revisiting) settled law." *Powell v. Nevada*, 511 U.S. 79, 86-87 (1994). Accordingly, Ms. Hawkins' petition should be denied.

Ms. Hawkins' argument here departs significantly from her Fourth Circuit argument. In her brief to the Fourth Circuit, Ms. Hawkins argued that the District Court erred in applying *Harris* because, she averred, the decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) altered the standard for finding actionable hostile work environment harassment. Ms. Hawkins (wisely) abandons that argument here and now concedes that *Harris* governs her harassment claims. She takes issue only with the Fourth Circuit's application of *Harris*.

In this respect, Ms. Hawkins' argument is neither compelling nor correct. The Fourth Circuit undeniably applied the *Harris* standard correctly in this case. Under *Harris*, a hostile work environment claim is actionable only when the alleged harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment." *Harris*, 510 U.S. at 21. Courts must look at all of the circumstances surrounding such claims, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

Here, Ms. Hawkins alleges harassment on the basis that: she was overly criticized in front of co-workers; she was accused of not being a team player; she was made to redo work many times; she did not get the same opportunities that were given to other managers; she did not receive a gift from Ms. Price when other managers did; her suggestions were dismissed, criticized or made fun

of; and, she was told that she was "not of the caliber" to be a manager at Pepsi. (Petition, at 6-10). In evaluating all of the evidence, the District Court found, and the Fourth Circuit agreed, that these allegations did not demonstrate the severe and pervasive environment that *Harris* prohibits.[7] The District Court's and the Fourth Circuit's findings are consistent with the findings of this Court and other federal courts. *Compare Faragher v. City of Boca Raton*, 524 U.S. 775, 789, 118 S. Ct. 2275, 2283 (1998) (" '[S]imple teasing', offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment' "); *Trujillo v. University of Colorado Health Sciences Center*, 157 F.3d 1211, 1214 (10th Cir. 1998) (granting summary judgment for defendant where plaintiff's evidence included "none of the racial comments or ridicule that are the hallmarks of hostile work environment claims," for instance, ordinary criticism and evaluation by his supervisor, denial of his request to attend a leadership program for Hispanics, and his supervisor's requirement that he submit appropriate documentation for absences from the office), *with Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (denying grant of summary judgment for defendant where plaintiffs were subjected to "comparisons to slaves and monkeys, derisive remarks regarding their African heritage, patently offensive

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[7] Petitioner argues certain evidence was excluded which, if admitted, would have clearly established her case for a hostile work environment. (Petition, at 19-20 n. 8). The evidence, however, was properly excluded by the District Court and, even if admitted, would not have affected the outcome of the case. (*See* Section I. C., *supra* at 21-25).

remarks regarding the hair of African-Americans and conversations in which a co-worker and supervisor used the word 'nigger' " and where African-Americans were forbidden from speaking to one another in the office); *Allen v. Michigan Department of Corrections*, 165 F.3d 405 (6th Cir. 1999) (denying summary judgment for defendant where plaintiff's personal property was tampered with, was subjected to derogatory racial insults by his supervisors, and received threatening letters containing racial epithets). At most, Ms. Hawkins proved that Ms. Price was a difficult supervisor and may even have disliked her. While an employer may not impermissibly discriminate against employees, '[a]n employer is not required to like his employees.' " *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir. 2000) (quoting *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)) (App. at 13). *See also Pagana-Fay v. Washington Suburban Sanitary Commission*, 797 F. Supp. 462, 473 (D. Md. 1992), *aff'd*, 64 F.3d 658 (4th Cir. 1995); *Windom v. City of St. Louis*, 427 F. Supp. 806, 813 (E.D. Mo.), *aff'd*, 568 F.2d 78 (8th Cir. 1977); *Bradington v. International Business Machines Corp.*, 360 F. Supp. 845, 855 (D. Md. 1973), *aff'd*, 492 F.2d 1240 (4th Cir. 1974). Additionally, the District Court and the Fourth Circuit found that "[petitioner's] complaints about Price's management style toward her are without a hint of racial significance." (App. at 13).

The Fourth Circuit clearly examined all of the circumstances surrounding petitioner's employment situation. It correctly concluded that petitioner had failed to show the "severe" and "pervasive" harassment necessary to establish actionable harassment.

CONCLUSION

Lisa Hawkins has not raised any issue in her Petition for Writ of Certiorari that warrants consideration by this Court. While Ms. Hawkins believes that she was a good worker and that her termination was unfair, she utterly failed to demonstrate that Pepsi treated her differently than similarly-situated white co-workers. That conclusion is unaffected by this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*,___ U.S. ___, 120 S. Ct. 2097 (2000). Accordingly, respondent PepsiCo, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: August 11, 2000

Respectfully submitted,

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